



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Chesoni, Nyarangi & Platt Ag JJA)**

**CRIMINAL APPEAL NO 66 OF 1984**

**JACKSON OLUOCH .....APPELLANT**

**JAMES ONGERE ABWOR.....RESPONDENT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the High Court at Kisumu, Schofield J)*

**JUDGMENT**

The two appellants Jackson Oluoch and James Ongere Abwor were on May 27, 1983 each convicted by the senior resident magistrate of Kisumu on three counts of robbery contrary to section 296(1) of the Penal Code and one of shop breaking and committing a felony contrary to section 306(a) of the Penal Code (cap 63) and each was sentenced to five years' imprisonment to run concurrently and the strokes to be cumulative, and each appellant was ordered to be subjected to Police Supervision for 5 years after release from prison. Their appeals to the High Court, Kisumu (Schofield J) were dismissed. Each has appealed to this court.

The grounds of appeal of Jackson Oluoch are:

1. That he voluntarily gave a sworn statement before the court of law to back his plea against charge. His wife also gave reliable evidence to support his alibis.
2. That the members of the prosecution staff totally failed to produce the relevant exhibits before the court of law for material proof of evidence in favour of his involvement in the alleged felony.
3. That the state did not call a qualified fingerprint specialist from the criminal record office to produce a photostat copy of finger impression to prove his connection with alleged home-made pistol at the scene.
4. That the firearm technician testified that the home-made pistol was capable of firing but absolutely failed to prove a true nature of robbery with violence involving a victim of the bullet.
5. That the state also failed to call a pathologist to produce reliable medical document for proof of evidence supporting the prosecution involving the victim of robbery at the scene of the alleged incident.
6. That the learned magistrate committed a grave error by basing his judgement on a proofless operation of identification which was fakely conducted contrary to law by the relevant authorities concerned.
7. That the honourable judge of the High Court was critically responsible for perversion of justice and execution of judgement based on fallacious factors operating contrary to principles of law and

identification parade.

8. That there was some amount of incredibilities to believe PW 3 Onyango and PW 5 Owino for their identification because they had already seen him before the date of the identification parade. That he had complained before and after the parade and it was recorded in the identification form by the parade officer. That PW 4 Abich Got and PW 7 Michael Omondi only made a dock identification which was unsafe.

That the sentence was harsh and excessive.

His prayer to this court is that the conviction should be quashed, the sentence set aside and he be set free.

James Onere Abwor appealed on the following grounds:

1. That he voluntarily gave a sworn statement before the court of law to back his plea against charge. His wife also gave reliable evidence to support his alibi.
2. That the members of the prosecution staff totally failed to produce the relevant exhibits before the court of law for material proof of evidence in favour of his involvement in the alleged felony.
3. That the state did not call a qualified fingerprint specialist from the Criminal Record Office to produce a photostat of finger impression to prove his connection with the alleged home-made pistol at the scene.
4. That the firearm technician testified that the home-made pistol was capable of firing but absolutely failed to prove a true nature of robbery with violence involving a victim of the bullet.
5. That the state also failed to call a pathologist to produce a reliable medical document for proof of evidence supporting the prosecution involving the victim of robbery at the scene of the alleged incident.
6. That the learned magistrate committed a grave error by basing his judgement on a proofless operation of identification which was fakely conducted contrary to law by the relevant authorities concerned.
7. That the honourable judge of the High Court was critically responsible for perversion of justice and execution of judgement based on fallacious factors operating contrary to principles of law and the identification parade.
8. That there was some amount of incredibilities to believe PW 3 Onyango and PW 5 Owino for their identification, because they had already seen him before the date of the identification parade. That he had complained before and after the parade and it was recorded down in the identification form by the parade officer. That PW 4 Abich Got and PW 7 Michael Omondi only made a dock identification which was unsafe. That the sentence was harsh and excessive.

His prayer to this court is similar to that of Jackson Oluoch.

Jackson Oluoch referred to his grounds of appeal and argued that the police officer who arrested him had known him before, that the description of some of the persons who took part in the robbery which was given by PW 3 Cypriano Onyango and PW 5 James Nyakwe Asembo did not match his physical appearance and that of the appellant, Aboo, that PW 12, PC Momanyi, who knew the appellants, went to Migori township to enquire and make arrests on the information he had been furnished with and yet he had to rely on an informer to arrest the appellants.

The appellant complained that he and the second appellant were convicted without the informer giving evidence although the trial court wanted the informer to testify. The second appellant took the court through his ground of appeal and said the pressure lamps whose light was said to have facilitated their identification should have been reproduced in court. This appellant said also that the learned Senior State Counsel did not support the convictions before the High Court. The learned Principal State Counsel Mr Bwonwonga supported convictions, readily acknowledged that the crucial issue was identification and conceded that as Cypriano Onyango had previously known both appellants, the identification parade was unnecessary and its result had no evidential value. Mr Bwonwonga argued that the evidence on identification of the sole witness Cypriano Onyango sufficed and that the description which was given by Cypriano Onyango to PC Momanyi substantially fitted that of the appellants. Mr Bwonwonga regarded PC

Momanyi's evidence as contradictory, retained the identification by PW 4 David Abichi and PW 7 Michael Omondi, amounting to dock identification and submitted that there is a concurrent finding on identification which is based on the evidence of Cypriano Onyango, David Abichi and Michael Omondi.

This is a second appeal and so only issues of law fall to be decided. We agree with the learned Principal State Counsel that the case against the appellants depends entirely on whether or not there was sufficient evidence of identification. The identification parade was unnecessary because Cypriano Onyango knew the appellants. Besides, PW 5, one of the identifying witnesses was, according to his evidence, told: "to identify the people who robbed me on August 6, 1982" the witness could reasonably take that to mean that persons who robbed him were at the parade and that therefore all he had to do was to pick them. The value of the parade as evidence was therefore considerably depreciated. *R v Mwangi s/o Manaa* [1936] 3 EACA 29. It is dangerous to suggest to an identifying witness that the person to be identified is believed to be present on the parade *Rex v Lulatikwa s/o Kabaile alias Rutahba s/o Kasese* [1941] 8 EACA 46.

The dock identification did not enhance the case of the prosecution because, without an earlier identification parade, such identification is almost worthless. *Owen Kimotho Kiarie v Republic* Cr Appeal No 93 of 1983 (unreported). The two witnesses PW 4 and PW 7 who identified the appellants in the dock did not attend the material identification parade. The learned senior resident magistrate and judge made concurrent findings that the identification parade was properly conducted and that the two appellants were positively identified. The two concurrent findings were based on the misdirection which we have already discussed. The misdirection constituted an error of law concerning a vital aspect of the prosecution case.

Mr Bwonwonga argued and submitted that the Senior Resident Magistrate and the judge made concurrent findings on identification which are supportable solely on the evidence of PW 3 Cypriano Onyango. It is the law that a fact may be proved by a single witness but when such evidence is in respect of identification it must be tested with the greatest care: *Rori v Republic* [1967] EA 583, *Abdallah bin Wendo & Another v R* [1953] 20 EACA 166 and *Benjamin Mugo Mwangi & Another v Republic* Cr Appeal No 100 of 1984 (unreported).

Cypriano Onyango, gave a description of some of the eight to ten people who entered his bar. He said:

"When the attackers came in I regarded them as army or policemen and I was not frightened. I saw the face of the accused. He has a brown face. He is himself a short boy. The other man was black, thin, tall and was wearing a jacket. The third man was much more elderly (the underlining is ours)".

Cypriano gave a description of three of the dozen or so persons who had raided his shop to PC Momanyi. The description was as follows:

"PW 3 said one was tall, fat and fair in complexion. The other was short, fat and fair in complexion. The third was short and brown (the underlining is yet again ours)."

PC Momanyi knew the appellants well and accepted that Cypriano Onyango had fairly described the appellants. Cypriano had seen the appellants prior to the night of the incident.

It is obvious from the sets of descriptions that PW 3 and PW 12 were narrating appearances of different persons. On that evidence, it is not possible to tell if PW 12 arrested the persons whose appearances were given by PW 3 or by the informer. Mr Bwonwonga appreciated the difficulty which emerged from the apparent contradictions and boldly invited us to ignore the evidence of PW 12, PC Momanyi. But even if we were to go along with Mr Bwonwonga's suggestion, we would still be left with the reasonable doubt whether PW 12, PC Momanyi arrested the persons who were described by PW 3 Cypriano Onyango or some other different pair.

The Senior Resident Magistrate and the judge considered the evidence of PW 12, PC Momanyi, as if that evidence disclosed just one description on which the arrest was made. That was an erroneous appreciation of the relevant evidence and a misdirection which prejudiced the appellants. Having considered and tested

as required the testimony of Cypriano Onyango on identification, and bearing in mind the other evidence, circumstantial or direct pointing to guilt, we cannot safely say that the evidence of identification is free from the possibility of error. The Senior Resident Magistrate corrected himself on the issue of identification but erred, as did the judge, in concluding that the evidence which was adduced even if correctly directed himself on the issue of identification but erred as did the judge, in concluding that the evidence which was adduced even if correctly applied to the tests, proved identification beyond reasonable doubt.

There are two other matters raised by the appeal upon which we wish to comment. First, the record shows that the judge did not specifically deal with the various matters to which Mr Ndegwa, State Counsel, mentioned in conceding the appeal. For instance, Mr Ndegwa had said that the identification parade forms did not correspond with the evidence and that descriptions which were given to the arresting officer were different from those of the appellants. We think that the judge should have considered Mr Ndegwa's submissions together with the record and the Senior Magistrate's findings plus the appellant's arguments before reaching his own conclusion.

That is the normal and fair approach. Secondly, the Senior Resident Magistrate invoked section 179(2) of the Criminal Procedure Code (cap 75) to convict the appellants on counts i, ii and iv of the minor charge under section 296 (1) of the Penal Code, (cap 63) for the reasons that the gangsters acted with restraint and decency, did not use their gun, and that such beating as PW 2, PW 5 and PW 7 were subjected to wasn't serious to justify the charge.

Under section 296 (2) of the Penal Code robbery with violence is committed in any of the following circumstances:

1. The offender is armed with any dangerous or offensive weapon or instrument, or
2. the offender is in company with one or more other person or persons or
3. at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

The ingredients of the offences of robbery under section 296(1) of the Penal Code are:

- a) stealing anything and
- b) at or immediately before or immediately after the time of stealing,
- c) using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.

So, it is not the degree of actual violence used that differentiates the two offences as the senior resident magistrate stated.

The learned judge did not deal with the appeal against conviction and sentence on count 3 nor did Mr Ndegwa address the High Court on that count, but as the appeal turns on the appellants' identification for all the charges the conviction on that count is equally unsafe.

We observe that in sentencing the appellants the Resident Magistrate made the police supervision order to apply to the sentence on count 3 of the shop breaking and committing a felony. They were first offenders and so the police supervision order was not automatic for the offence under section 306(a) of the Penal Code (cap 63), see section 344A of the Criminal Procedure Code (cap 75). To that extent the sentence on count 3 was illegal.

The upshot of what we have said is that the two appeals are allowed, convictions quashed, sentences and the reporting order set aside and the appellants shall be set at liberty unless otherwise lawfully held.

**Dated and delivered at Kisumu this 7th day of December, 1984.**

**Z.R CHESONI**

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**AG. JUDGE OF APPEAL**

**J.O NYARANGI**

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**AG. JUDGE OF APPEAL**

**H.G PLATT**

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**AG. JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**